IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 79

ROBERT L. PIERSON, et al.,

Petitioners,

v.

J. L. RAY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CARL RACHLIN,
No. 38 Park Row,
New York, N. Y. 10038.

MELVIN WULF,
No. 156 Fifth Avenue,
New York, N. Y.

Of Counsel:

FREDERICK A. O. SCHWARTZ, JR.,
LEONARD H. ROSENTHAL,
STEPHEN M. NAGLER.

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

October Term, 1965

No.

ROBERT L. PIERSON, *et al.*,

Petitioners,

v.

J. L. RAY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on October 25, 1965.*

Citations to Opinion Below

The District Court for the Southern District of Mississippi, Jackson Division, wrote no opinion. Its judgment

---

* In addition to the persons named in the caption, there are the following additional petitioners and respondents: *Petitioners*: John B. Morris, James P. Breeden and James G. Jones, Jr.; *Respondents*: J. B. Griffith, D. A. Nichols and James L. Spencer.

and order is at R. 645-648.* The opinion of the Circuit Court of Appeals, printed as Appendix A hereto, is reported at 315 F. 2d 213.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 25, 1965. On January 21, 1966, Mr. Justice Black signed an order extending petitioners' time within which to file a petition for certiorari to and including February 24, 1966. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether a municipal police justice (a) alleged to have conspired with police officers to have white and Negro Episcopal ministers arrested and knowingly convicted by him and sentenced to jail for seeking to use the waiting room of an interstate bus station that was posted "White Waiting Room Only—by Order of the Police Department" in order to enforce the segregation laws, customs, policies and usages of the State of Mississippi, and (b) whose conviction of the ministers for violating a statute that prohibited congregating under such circumstances that a breach of the peace might be caused was subsequently reversed at a trial *de novo* at the close of the prosecution's case on the ground that there was no evidence against the ministers, is immune from a suit for damages under 42 U. S. C. §1983, which (1) provides without exception that

* References preceded by "R" are to the pages of the mimeographed record used on the appeal to the Fifth Circuit.

"every" person who commits such an act shall be liable in damages, and (2) was thought by the Congress that enacted it to apply to such conduct by such judges.

2. Whether police officers are immune from liability for damages under 42 U. S. C. §1983 for acting under color of state law and custom to deprive persons of rights secured by the United States Constitution and laws because those persons had reason to believe that police officers might arrest and jail them illegally in order to preserve segregation but nevertheless chose to exercise their constitutional right to travel as an integrated group.

3. Whether if under state law police officers are not liable in damages for false arrest when the "breach of the peace" statute under which they purported to make the arrest had not yet been judicially declared unconstitutional, there does not remain a jury issue as to whether this statute was used as a sham justification for the arrest.

Statute Involved

The statute involved is Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U. S. C. §1983.

As printed in Title 42, the Section reads:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured at law, suit in equity, or other proper proceeding for redress."

Proceedings Below

Petitioners brought suit in the United States District Court for the Southern District of Mississippi, Jackson Division, against three policemen and one police justice of Jackson, Mississippi. The suit was for damages under (a) 28 U. S. C. §1343 alleging a cause of action under 42 U. S. C. §1983 and (b) 28 U. S. C. 1332 alleging diversity of citizenship and a cause of action for false arrest and imprisonment under Mississippi law. Judgment in favor of defendants-respondents were entered upon a jury verdict.

Upon appeal, the Fifth Circuit (1) reversed the judgment as to the policemen with respect to the federal cause of action under 42 U. S. C. §1983 but remanded with instructions that plaintiffs should not be permitted to recover if they knowingly went to a place where travelling as an integrated group would subject them to illegal arrest, (2) directed that the state law cause of action against the policemen should be dismissed and (3) held that the police justice was immune from suit under both causes of action and directed that the complaint against him should be dismissed.

Statement

A. Petitioners' Arrest and Confinement.

Petitioners are three white and one Negro Episcopal clergymen. As members of a "Prayer Pilgrimmage" they sought, in September 1961, to visit church institutions in both the South and the North, from New Orleans to Detroit, in order to deliver and dramatize their "message to the Church that the Church must become, in every phase of its life, that which by the grace of God it is—one Holy Fellow-

ship where racial barriers have been done away" (Defendants' Exhibit No. 1, R. 132).

On September 13 the clergymen arrived in Jackson, Mississippi, planning to take a Continental Trailways bus to Chattanooga, Tennessee.

At approximately 11:30 a.m., petitioners and eleven other Episcopal clergymen (nine white, two Negro) all dressed in clerical garb, arrived at the Jackson Trailways Bus Terminal in three taxis from Tougaloo College where they had spent the previous night. The bus to Chattanooga was scheduled to depart shortly after noon (R. 88-90, 180-181, 375-376, 463-464).

The ministers entered a waiting room, the entrance to which was marked "White Waiting Room Only—by Order of the Police Department" (R. 488-489, 270-277, 519-520). After entering the waiting room, they turned left to enter a restaurant. However, before more than four or five had passed through the restaurant doors, respondents Griffith and Nichols, Jackson police officers who had been waiting for the group to arrive,* ordered the group to "hold it" or "come out" (R. 90-93, 182-185, 376-378, 464-465, 545-546).

The ministers then gathered in the waiting room, outside the restaurant, and were told by the police officers to "move along". When the ministers said that they only wanted to eat and asked why they could not do so they were not answered but again told to move on. When they did not, they were arrested (R. 95-96, 186-187, 379, 465).

---

* Petitioner Jones testified that as the ministers passed the two police officers standing in the waiting room doorway, he heard one of them say "shall we get them now or later" (R. 91).

Defendant Ray, a superior police officer, then arrived. He walked directly to the ministers, ordered them to move along and when they again did not do so but explained that they were hungry and wished to eat before their bus departed, he placed them under arrest, put them in a paddy wagon and sent them to jail (R. 99-100, 189-191, 370-382, 467-469).

Petitioners testified that (1) no one followed them into the station, (2) the waiting room was quiet and (3) no one in it threatened them by word or gesture (R. 93-98, 181, 186-192, 376, 378-380, 463, 466-469). That testimony was confirmed by Father Layton P. Zimmer, a fellow Episcopal priest who was in the station in nonclerical garb and who observed petitioners' arrest (R. 546-550).

The arresting officers conceded that the ministers were orderly and quiet (R. 506, 583, 598; opinion below, Appendix A, p. 2A). However, the policemen said that there was a "crowd" in the station in an "ugly" mood and that consequently they feared that the ministers might be attacked (R. 494-496, 575-578, 592-593, 603-612). But when pressed about the crowd and its ugly mood, Officer Griffith conceded that "I just noticed maybe two or three of them mumbling, kind of saw them jabbering a little to each other . . . off at a distance, something like that (R. 496, 612).* Furthermore, there was no evidence whatsoever that any hostile persons were in the restaurant, which the police prevented the ministers, but no others, from entering.

---

* Similarly, Officer Nichols admitted that he did not mention an ugly mood when he telephoned the police station to obtain defendant Ray (R. 490).

The police conceded that they made no effort whatsoever to arrest the persons whom they claimed were in an ugly mood (or mumbling at a distance). Nor did they ask such persons to leave, or even say a word to them or caution or calm them in any way (R. 495, 584-585, 611-612). That the real aim of the police was to enforce segregation customs and laws is revealed by the police testimony (1) that it was wrong for whites and Negroes to be together in bus stations or anywhere (R. 485, 502); (2) that a Negro had never gone into that part of the station and not been arrested (R. 500); and (3) that "if [the ministers] did it again today" they would again arrest them (without any reference to a supposed ugly crowd) (R. 49).

B. Petitioners' Conviction by Respondent Spencer.

Two days after their arrest, petitioners were tried in the court of defendant Spencer, a police justice serving at the pleasure of the Mayor of Jackson (R. 272). Petitioners were tried upon a "General Affidavit" of defendant Ray which said that petitioners:

> "... with intent to provoke a breach of the peace, did then and there willfully and unlawfully congregate with others in or around ... a place of business engaged in selling or serving members of the public, and did then and there fail or refuse to disburse and move on as then ordered to do so by affiant, a law enforcement officer of the City of Jackson, Mississippi, a municipality, contrary to the laws and ordinances in such cases made and provided, and against the peace and dignity of the State of Mississippi." (R. 110-111; 238-239; 390.)

Seven months after petitioners' convictions, the State sought and obtained leave to amend the affidavit in respect of the three white petitioners (Pierson, Morris and Jones) by (1) striking the words "with intent to provoke a breach of the peace, did then and there wilfully and unlawfully" and substituting "under such circumstances that a breach of the peace might be occasioned thereby, did then and there", (2) adding the words "wilfully and unlawfully" prior to the words "fail or refuse" and (3) substituting "disperse" for "disburse" (R. 117-119, 238-239, 390).

The affidavit in its original and its amended form was written in terms of Section 2087.5 of the Mississippi Code, which had been enacted in 1960. Section 2087.5 subsequently was declared unconstitutional by this Court (at the same time as it granted the petition for certiorari) in a case similar to petitioners' which also arose from Police Justice Spencer's court *Thomas* v. *Mississippi*, 380 U. S. 564 (1965). Cf. *Edwards* v. *South Carolina*, 372 U. S. 229 (1963).

Defendant Spencer convicted petitioners of violating that statute and gave them the maximum sentence—four months in jail and a $200 fine.

Defendant Spencer admitted there had been no evidence that petitioners were disorderly in any way (R. 511-512). He also admitted that he had never researched the law as to whether a person was ever entitled to decline to obey an improper order of a police officer and he assumed that one was never entitled to do so (R. 516).

Instead, at petitioners' trial, he read to them an article of religion from the Episcopal book of Common Prayer dealing with the duty of priests to obey civil authorities

and gave his opinion that petitioners were "guilty" of violating that article (R. 532-539).

Police Justice Spencer had tried all the cases (some 50 trials and 300 defendants) which had previously arisen out of the efforts of integrated groups to use the Jackson bus terminal (R. 517-518).

C. The Subsequent Decision at a Trial De Novo That There Had Been No Evidence Against Petitioners.

Petitioners' convictions were vacated after trials *de novo* in the County Court of Hinds County. Petitioner Jones was the first to be retried. After the City offered its evidence, Jones moved for a directed verdict of not guilty; the County Judge granted the motion and adjudged him not guilty (R. 481-482). The County Court then granted the prosecutor's motion to *nol. pross.* the cases against the two other petitioners on the grounds that the evidence against them was the same as the evidence against Jones (R. 234-235, 245, 396).

D. The Trial and Appeal of This Action.

The jury found for respondents after the trial court had permitted petitioners to be examined about the following matters:

1. Whether they agreed with the Communist Party's demands dealing with race relations as set out in quotations from the *Daily Worker* of May 26, 1928 (R. 155-165);

2. Whether they believed in the abolition of all laws prohibiting intermarriage of persons of the Caucasian and the Negro races (R. 415-417, 160);

3. Whether they supported the "Freedom Ride Invasion" of Jackson (R. 214-219) and whether they supported the purposes and activities of those groups that call themselves Freedom Riders (R. 142-149, 225-253, 260-261, 268, 357, 405, 407, 409, 412-412);

4. Whether their attorneys in Police Justice Spencer's court had previously represented many Freedom Riders (R. 416);

5. Whether their trial counsel was the general counsel for the Congress of Racial Equality (CORE) (R. 419, 229-230, 317); and

6. Whether petitioner Pierson had suggested any corrections in a magazine article that had referred to a New York newspaper headline stating "Arrest Son-in-Law of Governor Rockefeller as 'Freedom Rider'" (R. 425-426).

In addition, the trial court permitted nine letters written by Petitioner Morris to prospective and actual members of the Prayer Pilgrimage to be introduced and extensively used in cross-examination concerning the aims of the Prayer Pilgrimage and the beliefs of Father Morris (R. 249-270, 278-362).

On the basis of the letters, the defense contended (1) that the ministers knew that travelling as an integrated group might subject them to arrest and jailing and (2) that the ministers prepared for the possibility that some of their members would be arrested and jailed.

On appeal, the Fifth Circuit Court of Appeals held the following:

A. *Policemen Defendants*:

1. The judgment in their favor in the civil rights cause of action, 42 U. S. C. §1943, should be reversed because the trial court permitted questions dealing with (1) their views on race as compared with the *Daily Worker's* and (2) the Freedom Riders, with whom, said the court, no connection was shown.

2. Petitioners would be entitled to a directed verdict on the issue of liability in the civil rights cause of action because their arrests were improper *but* the case should be remanded for a hearing on the merits because proof that petitioners planned to go to places where their orderly traveling as an integrated group might subject them to arrest would preclude recovery.

3. Without regard to the reasons for which they made the arrests or the circumstances existing at the time of the arrests, the policemen were immune from liability under the diversity cause of action for false arrest because the statute under which they purported to arrest petitioners had not yet been held unconstitutional.

B. *Police Justice Spencer* was immune from liability under both causes of action on the ground that he was a judicial officer and the complaint against him should therefore be dismissed.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING THAT A POLICE JUSTICE WHO ACTS UNDER COLOR OF STATE LAW OR CUSTOM KNOWINGLY TO DEPRIVE PERSONS OF RIGHTS SECURED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES IS IMMUNE FROM LIABILITY UNDER A STATUTE THAT APPLIES, WITHOUT EXCEPTION, TO "EVERY" PERSON, THAT WAS SAID BY THE CONGRESS THAT ENACTED IT TO APPLY TO JUDGES AND THAT WAS INTENDED TO CREATE A REMEDY FOR SHAM JUSTICE IN THE COURTS.

A. It is apparent from legislative history of 42 U. S. C. §1983, 17 Stat. 13, Section 1 of the Civil Rights Act of 1871, that Congress intended state court judges to be liable in damages if they acted under color of state law or custom knowingly to deprive a person of rights, privileges or immunities secured by the Constitution of the United States. This is not to say that a mere error of judgment or non-willful abuse of discretion would be actionable. Rather, a willful and knowing "deprivation of any rights, privileges or immunities" is the basis of remedial action.

The statute provided for no exceptions. It made "any" person who so deprives "any" person liable in damages.*

---

* As altered by the revisor who prepared the Revised Statutes of 1878, the statute refers to "every" person who deprives "any" person of his rights. "Every is just as inclusive as "any", but as originally enacted the prallelism of "any" in describing culprit and victim makes it even clearer that Congress did not intend to sub silentio immunity to judges.

The revisor removed other language that textually made it clearer that no immunity was intended. As enacted, the section stated that any person shall be liable for depriving persons of their constitutional rights, etc., under color of state law, custom, etc., *"any such law, statute, ordinance, regulation, custom or usage to the contrary notwithstanding"*. (Emphasis supplied to the words that were removed.)

The revisor lacked authority to alter the law substantively. See Revised Statutes of the United States, 1878, Preface, p. 4; Appendix, pp. 1092-1093; 19 Stat. 268, ch. 82 §4 as amended by 20 Stat. 27, ch. 26. Title 42 has not been enacted into positive law.

All the members of Congress who spoke on the problem explicitly stated that the section applied to judges. None disagreed. See *Congressional Globe,* 42d Cong., 1st Sess., 1871: Congressman Arthur, 3/31/71, p. 365, col. 3—p. 366, col. 1; Congressman Sheldon, 3/31/71, p. 368, col. 1; Congressman Lowe, 3/31/71, p. 376, col. 1; Congressman Lewis, 4/1/71, p. 385, col. 1. *Cf.* Senator Thurman, 4/13/71, p. 217, col. 1 (Appendix).

Congress was concerned not with protecting good men against having to face charges of wrongdoing but rather with defiance of law by mobs and officials including judges. Congress was concerned that "immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."* It was shocked at the record of many judges.** It was, indeed, the breakdown of justice that gave rise to the need for legislation.

If it be said that it is harsh or unwise to subject the state judiciary to suits alleging that they knowingly acted

---

* Congressman Lowe, 3/31/71, p. 374, col. 3.

** See for example: Senator Sherman (summing up conference report) "Spreading terror and violence . . . now exist unchecked by punishment, independent of law, uncontrolled by magistrates." 4/19/71, p. 820, col. 2.

Congressman Rainey: "The courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." 4/1/71, p. 394, col. 3.

Congressman Bentley: The remedy is needed because of "prejudiced juries and bribed judges": 4/3/71, p. 429, col. 2.

Senator Osborn: "These men with hands stained with blood, hostile to every man who stood by his country during the war, determined by fair means or by foul, that loyal men shall not remain in power, ought not to sit upon juries and administer the laws enacted to punish their own crimes." 4/13/71, p. 654, col. 2.

to deprive a man of his civil rights, the simple answer is that Congress in 1871 intended harsh remedies to check bloody terror, stubborn defiance and abuse of legal process. A bloody civil war had been fought. Congress had ousted state governments altogether and put in military governments. And then after terror against and injustice to the newly freed blackmen and the loyalists spread, Congress enacted the Civil Rights Act of 1871. Other sections of that Act were potentially far harsher than applying Section 1 to judges. See, *e.g.*, Sections 3, 4 and 6.

The legislative history of Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, also supports the conclusion that the 1871 Congress intended to cover the state judiciary. It does so because (1) the similar terms of the earlier Act were specifically referred to as a guide to the 1871 Act by its principal sponsor, Congressman Shellabarger, when he introduced the 1871 Act, *Cong. Globe,* 42d Cong., 1st Sess. 1871, 3/28/71, p. 319, col. 3, printed in Appendix, p. 68, col. 1 and (2) the temper of the earlier Congress casts light upon that of the later Congress. President Andrew Johnson vetoed the 1866 Act after it was first passed on the ground, among others, that it subjected state judges to criminal liability for depriving persons of their civil rights. *Cong. Globe,* 39th Cong., 1st Sess., 3/27/66, pp. 1679, 1680, col. 2. Congress re-enacted the Act over the President's veto and in so doing specifically stated that it was intended that judges who knowingly used their office to deprive persons of their civil rights should be punished.*

---

* See Senator Trumbull, Chairman of the Committee on the Judiciary, who led the effort to overrule the veto, at *id.*, 4/4/66, pp. 1758-59, passim and in particular:

(continued on page 15)

B. The decision below conflicts with the decision of the Third Circuit in *Picking* v. *Pa. R. Co.*, 151 F. 2d 240 (3d Cir. 1945). *Cf. McShane* v. *Moldovan*, 172 F. 2d 1016 (6th Cir. 1949). *Picking* is the only decision dealing with the question of judicial immunity under Section 1983 to consider any part of the legislative material referred to above. See 151 F. 2d at 251, n. 12.*

(continued from page 14)

> "But it is said that under this provision judges of the courts and ministerial officers who are engaged in the execution of any such statutes may be punished. . . . I admit that a ministerial official or a judge, if he acts corruptly or viciously or under color of an illegal act may be and ought to be punished. . . ."
>
> "The assumption that State judges and other officials are not to be held responsible for violations of United States laws, when done under color of State statutes or customs, is akin to the maxim of the English law that the King can do no wrong. It places officials above the law. It is the very doctrine out of which the rebellion was hatched."

See also Senator Johnson, *id.*, 4/5/66, p. 1778, col. 1; Senator Cowan, 4/5/66, p. 1783.

Congressman Lawrence, the only speaker on the subject in the House, said:

> ". . . it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy civil rights of citizens. . . ." *Id.*, 4/7/66, p. 1837, col. 1.

* After this Court's decision in *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), holding that state legislators were immune from liability under (the predecessor of) Section 1983, the Third Circuit has queried whether it would still reach the result of *Picking*. See *Ginsberg* v. *Stern*, 251 F. 2d 49 (3d Cir. 1958); *Ginsberg* v. *Stern*, 225 F. 2d 245 (3d Cir. 1955). For cases relying upon *Tenney* to hold that judges were immune, see *Kenney* v. *Fox*, 232 F. 2d 288 (6th Cir. 1956); *Tate* v. *Arnold*, 223 F. 2d 782 (8th Cir. 1955); *Cauley* v. *Warren*, 216 F. 2d 74 (7th Cir. 1950); *Francis* v. *Crafts*, 203 F. 2d 809 (1st Cir.), *cert. denied*, 346 U. S. 835 (1953).

C. This Court's decision in *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), has been misapplied by several circuit courts of appeals (whose decisions are cited in the preceding footnote) to support the ruling that judges are immune from suit under 42 U. S. C. §1983.

Congress intended to cover judges but it did not intend to cover legislators. The statute on its face covers those who act under color of law, not those who enact laws.* The principal problem in 1871 was not with legislation but with sham justice.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING THAT POLICEMEN ARE NOT LIABLE IN DAMAGES FOR DEPRIVING PERSONS OF THEIR CONSTITUTIONAL RIGHTS IF THE PERSONS SO DEPRIVED KNOW THAT THE POLICEMEN MIGHT DISREGARD THEIR CONSTITUTIONAL RIGHTS BUT NEVERTHELESS CHOSE TO EXERCISE THOSE RIGHTS.

A. Under the decision below, the damage remedy of 42 U. S. C. §1983 is unavailable to anyone who chooses to exercise his constitutional rights knowing that exercise of those rights may subject him to illegal treatment by the police.

The evidence "against" petitioners shows nothing more than that by way of a "plan and purpose" to be arrested,

---

* See that distinction made explicit during the debate on the analogous provisions of Section 2 of the Civil Rights Act of 1866. *Cong. Globe*, 39th Cong., 1st Sess., 4/5/66, p. 1758, col. 1 (Senator Trumbull). The United States Constitution itself mentions a legislative immunity, but no judicial immunity. Article I, Section 6.

petitioners *did* nothing to initiate arrest other than to enter the bus terminal as an integrated group. Their orderly conduct has not been disputed. To say that persons who engage in constitutionally protected conduct and are therefore arrested through the unconstitutional application of a statute, subsequently declared unconstitutional on its face, are evincing a "plan and purpose" to be arrested that frees the policemen who arrested them from liability is absurd.

If, as the Court below found, the arrests were improper under 42 U. S. C. §1983, surely the police who made the improper arrests should not be immune from responsibility because they happened to arrest persons who intentionally challenged the segregation customs of Mississippi. Quite the contrary. Surely those who act to implement the Constitution—or to dramatize the fact that it is being ignored—are not thereby deprived of the benefit of laws designed to implement the Constitution.

B. The decision below does not, of course, concern petitioners alone. A civil remedy for damages is a device to substitute law for force. To say that those who are at the forefront of the civil rights movement are to be denied the right to obtain damages for deprivation of their civil rights removes one more safety valve from a situation where the rule of law is already endangered. Similarly, to tell policemen that they are free from future personal responsibility for illegally arresting those who knowingly challenge segregation or those who seek to focus attention upon injustice scarcely makes more likely the voluntary observation of the Constitution.

C. Although the decision of the Court below that is under discussion in this section is not technically a final judgment, the impact of that decision upon this case and upon civil rights supporters and policemen generally makes it appropriate that this Court grant certiorari to review this decision as well as the final judgments discussed in the other sections of this petition.

This Court has jurisdiction under 28 U. S. C. §1254(1) to review non-final decisions. See *Larsen* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, n. 3 (1949); *Land* v. *Dollar*, 330 U. S. 731, 734, n. 2 (1947); *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1944).

The decision below is fundamental to the future conduct of this case. It is fundamental to the future conduct of policemen. It is fundamental to the present and past rights of scores of others who sought to exercise their constitutional rights in the face of official opposition. It should be reviewed by this Court now.

III.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING THAT POLICEMEN ARE NOT LIABLE FOR MAKING ARRESTS WHEN THEY USE A STATUTE THAT SUBSEQUENTLY IS DECLARED UNCONSTITUTIONAL ON ITS FACE AS A SHAM BASIS FOR THE ARREST.

Assuming that the court below was correct in deciding that it is the law in Mississippi (contrary to most jurisdictions) that a police officer is not liable for false arrest when he makes an arrest in reliance upon a statute that is subsequently held unconstitutional, it was nevertheless im-

proper to hold that the state law cause of action against the policeman should be dismissed. There remains a jury question as to whether the arrest was really in reliance upon the statute or whether the police really arrested petitioners because they were an integrated group and used the "breach of the peace statute" as a sham justification for the arrest. In other words, even though the statute had not yet been declared unconstitutional on its face, there remains the issue whether it was knowingly applied unconstitutionally. See *Nesmith* v. *Alford,* 318 F. 2d 110 (5th Cir. 1963).

Petitioner's proof was that there were no threats from others in the waiting room of the bus station. The police testimony itself indicated their aim to preserve racial separation and was weak and conflicting on the issue of whether there was in fact an "ugly" crowd in the waiting room. In any event, the police admitted that they made no effort whatsoever to calm others in the waiting room. And there was no evidence that there was any danger of a breach of the peace in the restaurant which the police prevented the ministers from entering though they could have kept out those who supposedly were hostile to the ministers.

The Mississippi Supreme Court decision in *Golden* v. *Thompson,* 194 Miss. 241, 11 So. 2d 906 (1943), cited by the court below to support its decision that the state law cause of action against the police officer should not be retried in fact requires that the police at least act in "good faith in reliance" on the statute that subsequently is declared invalid. It is for a jury to decide whether the police acted in good faith. See *e.g., Miller* v. *Stimmett,* 257 F. 2d 910 (10th Cir. 1958).

Here again a narrow interpretation, this time of state law, can have widespread effects upon many persons other than the minister and the policemen involved herein.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL RACHLIN,
38 Park Row,
New York, New York.

MELVIN WULF,
156 Fifth Avenue,
New York, N. Y.

Counsel for Petitioners.

Of Counsel:

FREDERICK A. O. SCHWARTZ, JR.,
LEONARD H. ROSENTHAL,
STEPHEN M. NAGLER,

February 21, 1966.